

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

FILED  
JAN 27 1984

Judge George N. Leighton  
U. S. District Court

MIDWAY MFG. CO.,  
an Illinois corporation,

Plaintiffs,

vs.

NORTH AMERICAN PHILIPS  
CONSUMER ELECTRONICS CORP.,

PARK TELEVISION d/b/a  
PARK MAGNAVOX HOME  
ENTERTAINMENT CENTER,  
an Illinois partnership, and

ED AVERETT,  
an individual,

Defendants.

Civil Action No. 81 C 6434

The Honorable  
George N. Leighton

JURY DEMANDED

DOCKETED  
JAN 31 1984

PLAINTIFF MIDWAY MFG. CO.'S  
MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Midway has moved for partial summary judgment on certain defenses raised by defendants to the validity of Midway's Copyright in the PAC-MAN video game. The defendants have stated in answers to Midway's interrogatories\* that they contend that PAC-MAN is not an original work of authorship. They also contend that the copyright is invalid. Yet, when asked for the specific legal and factual bases for these contentions, defendants' responded with vague contentions, and failed to identify any specific facts that would warrant these issues going to the jury.

The purpose of this motion is to eliminate these sham issues from this case and to shorten the trial.

\*Exhibit E

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## II. MIDWAY HAS A STRONG PRIMA FACIE CASE OF OWNERSHIP OF A VALID COPYRIGHT

Under the Copyright Act, Midway's certificate of copyright registration of PAC-MAN (Exhibit A) is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. §410(e). Midway Mfg. Co. v. Artic Int'l. Inc., 547 F. Supp. 999, 1007 (N.D. Ill. 1982), 704 F.2d 1009 (7th Cir. 1983). The defendants have the burden of overcoming this presumption. Id.

## III. DEFENDANTS CANNOT REBUT THE PRESUMPTION OF VALIDITY

### A. There Can Be No Basis For Defendants' Claim That PAC-MAN Is Not An Original Work of Authorship

To be copyrightable, a work must be "original." 17 U.S.C. §102(a). The test for originality "is concededly one with low threshold." L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.) (en banc), cert. denied, 429 U.S. 857 (1976). "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250, 23 S. Ct. 298, 47 L. Ed. 460 (1902).

Defendants, when asked to "identify with specificity every legal and factual basis . . . including the identify of any document" for their contention that PAC-MAN is not original, gave the following nonspecific answer:

#### Response No. 1(b)

To the extent presently known, North American believes NAMCO had knowledge of the work of Tomy, Corp., Tomy-Kyogo and Kyutaro, a Japanese cartoon figure. Documents relevant to this interrogatory have been produced and used as deposition exhibits in depositions taken in this case.

On the basis of Defendants' interrogatory answers, summary judgment should be granted.

In Midway Mfg. Co. v. Bandai-America, Inc., 546 F. Supp. 125, 149, 150 (D.N.J. 1982), the deposition of one Iwatoni, the Namco (of Japan) employee who created PAC-MAN, was taken by the defendants. The court held that a reasonable jury could not discern substantial similarity between the Japanese ghost character Kyutaro and the ghosts in the PAC-MAN game, and granted summary judgment on that issue. In doing so, the Court held that Iwatoni's knowledge of Kyutaro made no difference. On this basis, Defendants claim that PAC-MAN is not original based on Namco's alleged prior knowledge of Kyutaro should be dismissed.

Equally, without merit is Defendant's claim that Namco's "knowledge" of the work of Tomy Corp. or Tomy-Kyogo defeats the originality of the PAC-MAN. First of all, no specific work has been identified. Second, no specific factual basis for this contention has been identified.

Although the Defendants have not identified a specific Tomy work in this case, defendants in past cases have claimed that Tomy's "Mr. Mouth" toy was a "preexisting work" that would defeat the originality of the PAC-MAN game. In Bally Midway Mfg. Co. v. Mischok Toy Co., No. 82-C-235 (E.D.N.Y., Dec. 30, 1982), Judge Nickerson directed a verdict that Midway was the owner of a valid copyright in the PAC-MAN audiovisual work, in spite of the fact that the Tomy Mr. Mouth toy was in evidence before the jury. Pertinent pages of the transcript of that trial are attached as Exhibit B.

Although Judge Meanor did not grant summary judgment in the Tomy "Mr. Mouth" toy defense in the Bandai case, 546 F. Supp. at 150, 151, Midway believes that this Court should grant summary judgment on this issue for the following reasons:

(1) All of the documents produced in the Bandai case were produced for inspection by the defendants in the Mischok Toy case. These same documents, along with the transcript of the trial in the Mischok Toy case were produced for inspection in this case. Cohen Aff., Ex. C.

(2) Plaintiff is aware of no evidence to be offered in this case on the Tomy "Mr. Mouth" toy issue that has any probative value over that which was in evidence in the Mischok Toy case.

(3) Notwithstanding Judge Meanor's decision with respect to Mr. Mouth, Midway believes that the PAC-MAN video game is so obviously not a copy of Mr. Mouth as to warrant the grant of summary judgment.

B. There Is No Evidence Of Any  
Misrepresentations To The Copyright Office

Although Defendants contend that the PAC-MAN copyright is invalid on the basis that "Midway made significant misrepresentations to the Copyright Office in obtaining the copyright" [Def. Response to Interrogatory No. 2(b)], they fail to specifically identify any misrepresentations. The only basis Defendants assert for this claim is "the failure to disclose the specific works and the prior ownership interest in the audiovisual work identified in the answer to Interrogatory No. 1." This contention is nonsense.

The failure to disclose the existence of an unidentified Tomy work or a Japanese cartoon character to the Copyright Office could not possibly constitute a misrepresentation, because they are not "preexisting works" that must be identified on the copyright application.

Box 6 on the form PA copyright application (Exhibit D) requires the identification of "any preexisting work...that the work is based on." This part of the application must be completed only if the work sought to be copyrighted is a "derivative work." (See instructions for Space 5 on form P.A., Ex. D).

As is stated in 1 Nimmer, Nimmer on Copyright, §3.01, p. 3-3,

"It should be noted, however, that the term derivative work in a technical sense does not refer to all works which borrow in any degree from preexisting works. A work is not derivative unless it has substantially copied from a prior work. If that which is borrowed consists merely of ideas and not of the expression of ideas, then although the work may have in part been derived from

prior works, it is not a derivative work. Put in another way, a work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work. It is saved from being an infringing work only because the borrowed or copied material was taken with the consent of the copyright owner of the prior work, or because the prior work has entered the public domain."

Because there is no basis for a claim that Iwatoni "substantially copied" from any Tomy work or from the Japanese cartoon ghost character, there is no basis for claiming that PAC-MAN is a "derivative work" of either of these works. Thus Midway's motion for summary judgment that no misrepresentations were made to the Copyright Office should be granted.

The invalidity defenses of the Defendants are highly technical ones, at best. As noted by Judge Decker in Midway Mfg. Co. v. Artic Int'l., Inc., 547 F. Supp at 1010:

"It will not do to be overstrict as to the technicalities of the Copyright Act. . . . If the statute is substantially and in good faith complied with by a person seeking copyright protection and if others have not been misled into thinking that the work is not copyrighted, it is enough."

#### CONCLUSION

For the reasons stated above, Midway's motion should be granted.



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Donald L. Welsh  
A. Sidney Katz  
Eric Cohen  
WELSH & KATZ  
135 South LaSalle Street  
Suite 1625  
Chicago, Illinois 60603  
(312) 781-9470

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

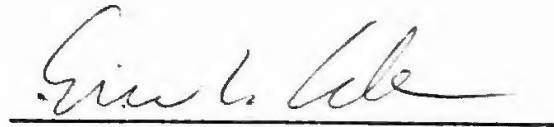
This will certify that a copy of PLAINTIFF MIDWAY MFG. CO.'S  
MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT  
has been hand delivered to:

James H. Alesia, Esq.  
Reuben & Proctor  
19 South LaSalle Street  
Chicago, Illinois 60603

Theodore Anderson, Esq.  
Neuman, Williams, Anderson  
& Olson  
77 West Washington Street  
Room 2000  
Chicago, Illinois 60602

Counsel for Defendants

this 25th day of January, 1984.



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Office in accordance with the provisions of section 410(a) of title 17, United States Code, attests that copyright registration has been made for the work identified below. The information in this certificate has been made a part of the Copyright Office records.

*Wanda L. Ladd*

REGISTER OF COPYRIGHTS  
United States of America

REGISTRATION NUMBER

PA 7 ...

83-768

PA

PAU

EFFECTIVE DATE OF REGISTRATION

NOV. ...

13 ...

1980

Month

Day

Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE CONTINUATION SHEET (FORM PA/CON)

1  
Title

TITLE OF THIS WORK:

PAC-MAN

NATURE OF THIS WORK:  
(See instructions)

Audiovisual work

PREVIOUS OR ALTERNATIVE TITLES:

PUCKMAN

2  
Author(s)

IMPORTANT:

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). If any part of this work was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates blank.

NAME OF AUTHOR:

Namco Limited

Was this author's contribution to the work a "work made for hire"? Yes ☒ No ☐

DATES OF BIRTH AND DEATH:

Born (Year) Died (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of (Name of Country) } or { Domiciled in Japan (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes ☐ No ☒  
Pseudonymous? Yes ☐ No ☒

If the answer to either of these questions is "Yes," see detailed instructions attached

AUTHOR OF: (Briefly describe nature of this author's contribution)

All cinematographic material

NAME OF AUTHOR:

Was this author's contribution to the work a "work made for hire"? Yes ☐ No ☐

DATES OF BIRTH AND DEATH:

Born (Year) Died (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of (Name of Country) } or { Domiciled in (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes ☐ No ☐  
Pseudonymous? Yes ☐ No ☐

If the answer to either of these questions is "Yes," see detailed instructions attached

AUTHOR OF: (Briefly describe nature of this author's contribution)

NAME OF AUTHOR:

Was this author's contribution to the work a "work made for hire"? Yes ☐ No ☐

DATES OF BIRTH AND DEATH:

Born (Year) Died (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of (Name of Country) } or { Domiciled in (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes ☐ No ☐  
Pseudonymous? Yes ☐ No ☐

If the answer to either of these questions is "Yes," see detailed instructions attached

AUTHOR OF: (Briefly describe nature of this author's contribution)

3  
Creation and Publication

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED:

Year 1980...

(This information must be given in all cases.)

DATE AND NATION OF FIRST PUBLICATION:

Date May 22, 1980  
(Month) (Day) (Year)

Nation Japan  
(Name of Country)

(Complete this block ONLY if this work has been published.)

4  
Claimant(s)

NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S):

Midway Mfg. Co., 10750 W. Grand Avenue  
Franklin Park, Illinois 60131

TRANSFER: (If the copyright claimant(s) named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.)

Namco Limited assigned "the entire right, title and interest" in statutory copyright in the United States and in the

- Complete all applicable spaces (numbers 5-9) on the reverse side of this page.
- Follow detailed instructions attached.
- See the form at line 2.

Exhibit A

DO NOT WRITE HERE

Page 1 of 3

CORRESPONDENCE

☐ Yes

REPORT RECEIVED

13 NOV 1980

COPYRIGHT  
OFFICE  
USE  
ONLYDEPOSIT ACCOUNT  
FUNDS USED☐

REMITTANCE NUMBER AND DATE

30401 UBSpec

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED ADDITIONAL SPACE, USE CONTINUATION SHEET (FORM PA/CON)

## PREVIOUS REGISTRATION:

- Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? Yes ..... No **X**
- If your answer is "Yes," why is another registration being sought? (Check appropriate box)
- ☐ This is the first published edition of a work previously registered in unpublished form.
- ☐ This is the first application submitted by this author as copyright claimant.
- ☐ This is a changed version of the work, as shown by line 6 of the application.
- If your answer is "Yes," give: Previous Registration Number ..... Year of Registration .....

**5**Previous  
Registration

## COMPILATION OR DERIVATIVE WORK: (See instructions)

PREEXISTING MATERIAL: (Identify any preexisting work or works that the work is based on or incorporates.)

None

MATERIAL ADDED TO THIS WORK: (Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.)

**6**Compilation  
or  
Derivative  
Work

DEPOSIT ACCOUNT: (If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.)

Name: .....

Account Number: .....

CORRESPONDENCE: (Give name and address to which correspondence about this application should be sent.)

Craig E. Larson, DePaoli & O'Brien  
Name: .....Address: 1911 Jeff. Davis, Hwy., #1005  
(Apt.)Arlington, VA. 22202  
(City) (State) (ZIP)**7**Fee and  
Correspondence

CERTIFICATION: \* I, the undersigned, hereby certify that I am the: (Check one)

☐ author ☐ other copyright claimant ☐ owner of exclusive right(s) ☒ authorized agent of: Midway Mfg. Co.

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.



Handwritten signature: (X) ... Craig E. Larson

Typed or printed name: Craig E. Larson

Date: March 5, 1980

**8**Certification  
(Application  
must be  
signed)

CRAIG E. LARSON

1911 Jeff. Davis Hwy, #1005

Arlington, VA. 22202

(City)

(State)

(ZIP code)

MAIL  
CERTIFICATE  
TO(Certificate will  
be mailed in  
window envelope)**9**Address  
For Return  
of  
Certificate



If at all possible, try to fit the information called for into the spaces provided on Form PA.

If you do not have space enough for all of the information you need to give on Form PA, use this continuation sheet and submit it with Form PA.

If you submit this continuation sheet, leave it attached to Form PA. Or, if it becomes detached, clip (do not tape or staple) and fold the two together before submitting them.

**PART A** of this sheet is intended to identify the basic application. **PART B** is a continuation of Space 2. **PART C** is for the continuation of Spaces 1, 4, or 6. The other spaces on Form PA call for specific items of information, and should not need continuation.

REGISTRATION NUMBER

PA 1 ...

83-768

PA

PAU

EFFECTIVE DATE OF REGISTRATION

NOV. 13 1980

(Month)

(Day)

(Year)

CONTINUATION SHEET RECEIVED

13 NOV 1980

Page 3 of 3 pages

DO NOT WRITE ABOVE THIS LINE. FOR COPYRIGHT OFFICE USE ONLY

<b>(A)</b> Identification of Application	<b>IDENTIFICATION OF CONTINUATION SHEET:</b> This sheet is a continuation of the application for copyright registration on Form PA, submitted for the following work:	
	<ul style="list-style-type: none"><li>• <b>TITLE:</b> (Give the title as given under the heading "Title of this Work" in Space 1 of Form PA.)</li><li>• <b>NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S):</b> (Give the name and address of at least one copyright claimant as given in Space 4 of Form PA.)</li></ul>	

<b>(B)</b> Continuation of Space 2	<input type="checkbox"/>	<b>NAME OF AUTHOR:</b> Was this author's contribution to the work a "work made for hire"? Yes ..... No .....	<b>DATES OF BIRTH AND DEATH:</b> Born ..... Died .....
		<b>AUTHOR'S NATIONALITY OR DOMICILE:</b> Citizen of ..... } or { Domiciled in .....	<b>WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:</b> Anonymous? Yes ..... No ..... Pseudonymous? Yes ..... No .....
		<b>AUTHOR OF:</b> (Briefly describe nature of this author's contribution)	If the answer to either of these questions is "Yes," see detailed instructions attached
	<input type="checkbox"/>	<b>NAME OF AUTHOR:</b> Was this author's contribution to the work a "work made for hire"? Yes ..... No .....	<b>DATES OF BIRTH AND DEATH:</b> Born ..... Died .....
		<b>AUTHOR'S NATIONALITY OR DOMICILE:</b> Citizen of ..... } or { Domiciled in .....	<b>WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:</b> Anonymous? Yes ..... No ..... Pseudonymous? Yes ..... No .....
		<b>AUTHOR OF:</b> (Briefly describe nature of this author's contribution)	If the answer to either of these questions is "Yes," see detailed instructions attached
	<input type="checkbox"/>	<b>NAME OF AUTHOR:</b> Was this author's contribution to the work a "work made for hire"? Yes ..... No .....	<b>DATES OF BIRTH AND DEATH:</b> Born ..... Died .....
		<b>AUTHOR'S NATIONALITY OR DOMICILE:</b> Citizen of ..... } or { Domiciled in .....	<b>WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:</b> Anonymous? Yes ..... No ..... Pseudonymous? Yes ..... No .....
		<b>AUTHOR OF:</b> (Briefly describe nature of this author's contribution)	If the answer to either of these questions is "Yes," see detailed instructions attached

<b>(C)</b> Continuation of other Spaces	<b>CONTINUATION OF</b> (Check which): <input type="checkbox"/> Space 1 <input checked="" type="checkbox"/> Space 4 <input type="checkbox"/> Space 6
	Western hemisphere in and to a certain amusement game known as "Pac-Man" or "Puckman" in an ASSIGNMENT OF COPYRIGHTS dated October 10, 1980 (said ASSIGNMENT is being recorded concurrently with this application).

EASTERN DISTRICT OF NEW YORK

-----X

BALLY MIDWAY MFG. CO., an :  
Illinois Corporation, :  
Plaintiff, : 82-C-2353  
-against- :  
MISCHOK TOY CO., INC. d/b/a :  
FABLE TOY COMPANY, a New York :  
Corporation; FAY SCHWARTZ; :  
ABE PLACHTER; ABE STAUM; :  
ELDORADO PROPERTIES; PETER :  
BUXBAUM; and SURF BOWLER, :  
Defendants. :

-----X

United States Courthouse  
Brooklyn, New York  
DECEMBER 22 1982  
10:00 A.M.

B E F O R E :  
HONORABLE EUGENE M. NICKERSON, U.S.D.J.

EXHIBIT B

HENRY SHAPIRO  
OFFICIAL COURT REPORTER

EASTERN DISTRICT COURT REPORTERS  
UNITED STATES DISTRICT COURT  
225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201

2 A The MS. PAC-MAN.

3 Q MS. PAC-MAN or MR. PAC-MAN Game?

4 A No, sir.

5 Q Do you recall discussing the other letters that  
6 were received by Mr. Marofske in connection with this  
7 transaction, with Namco?

8 A What other letters, Mr. Lichtenberg?

9 Q Isn't it a fact that you really discussed all  
10 of those letters with Mr. Marofske, that were involving  
11 PAC-MAN?

12 A I don't know that Mr. Marofske discussed all  
13 his mail with me.

14 Q Weren't you privied to all of the letters that  
15 were received in your company, that were received in  
16 connection with PAC-MAN, whether they were directed to  
17 your attention or to Mr. Marofske's attention?

18 A Not necessarily.

19 At that time, I did not hold the position that  
20 I hold now.

21 Q Now, in connection with these PAC-MAN Games,  
22 did you have any discussion concerning Tomy=Kyogo's prior  
23 rights to the name PUCK-MAN?

24 A At what time, Mr. Lichtenberg?

25 Q At any time.

2 Tomy-Kyogo was sometime during the summer of 1981.

3 I think it was 1981.

4 Q And isn't it a fact that Tomy-Kyogo -- K-o-g-o --  
5 company in Japan --

6 A That is not correct, that is K-y-o-g-o.

7 MR. LICHTENBERG: Thank you.

8 Q -- made a claim that retained the right to the  
9 PAC-MAN character or PUCK-MAN character?

10 A May I have the question repeated, sir, please?

11 THE COURT: Yes.

12 (Question read.)

13 THE WITNESS: Sometime during that period,  
14 our company contacted, and somehow we were told that  
15 Tomy had claimed certain rights to a PAC-MAN like  
16 character and name.

17 Q And did you read the letter in which that claim  
18 was made?

19 A There was correspondence, I believe on that,  
20 M. Lichtenberg, and --

21 THE COURT: Come up here, please.

22 (The following transpired at the side bar.)

23 THE COURT: Now, what proof is there that  
24 Tomy was the originator of this? This is all hearsay.

25 MR. LICHTENBERG: He has a letter from Mr. O'Brien,

2 THE COURT: What difference does that make?

3 MR. LICHTENBERG: We got it from his files.

4 THE COURT: What difference does it make,  
5 What they claim? Either they do or they do not.  
6 What this witness says, about what they claim, what  
7 conceivable relevance does it have? They either have  
8 the rights or they do not. Do you have any proof  
9 that they have those rights?

10 MR. RUDOFISKY: It changes the history through  
11 this man. Our depositions were cut off and we  
12 got this information --

13 THE COURT: Whether your deposition was cut  
14 off or not, what is the proof that you want to offer  
15 now? Is he going to show that Tomy has the rights,  
16 rather than Namco?

17 MR. LICHTENBERG: There is correspondence --

18 THE COURT: Between whom?

19 MR. LICHTENBERG: Tomy and their company.

20 THE COURT: What difference does it make?

21 MR. SUSSMAN: As Mr. Jarocki testified on direct,  
22 there are agreements between Midway and Tomy, which  
23 are in Exhibit 40 of the jury's book. They are as  
24 September '81. As of that date, Tomy relinquished  
25 whatever rights they had -- assuming that they had any

EASTERN DISTRICT COURT REPORTERS

UNITED STATES DISTRICT COURT

225 CADMAN PLAZA EAST

BROOKLYN, NEW YORK 11201



2 your Honor.

3 THE COURT: What is the answer to that?

4 MR. LICHTENBERG: Subsequently there was an  
5 agreement -- there was a licensing back agreement  
6 and after that agreement -- after the agreement,  
7 your Honor. Tomy insisted that although they had  
8 the agreement, that they still maintained their rights  
9 to the character --

10 THE COURT: What proof is there? They can  
11 claim anything they want. They can claim ownership  
12 to this Courthouse. What difference does it make,  
13 whether they claim it or not? You either prove that  
14 they have those rights or you do not. Whether he  
15 made a claim to him, cannot make the slightest  
16 difference, and can only serve to confuse the jury.

17 MR. RUDOFISKY: May I ask Mr. Lichtenberg a  
18 question off the record, Judge?

19 THE COURT: Yes.

20 (Pause.)

21  
22 (Continued on next page.)  
23  
24  
25

2 the fraudulent representation before the copyright  
3 office, that at the time they made their copyright,  
4 they never had the right to the character.

5 THE COURT: If you have some proof to show them  
6 that they did not have those rights at the time, fine,  
7 I will let that in.

8 MR. LICHTENBERG: I have copies of some patent  
9 applications showing that it was in existence --

10 MR. SUSSMAN: But this witness knows nothing  
11 about it.

12 MR. LICHTENBERG: -- but they were involved --

13 THE COURT: Do you want to start objecting to  
14 some of these, please?

15 (The following took place in open Court.)

16 Q In connection with the Tomy Company of Japan,  
17 did you have any knowledge of their -- Defendant's Exhibit  
18 324, the game called "MR. MOUTH"?

19 A As I recall, the first time I heard of the game  
20 was sometime during that summer. Of 1981, we were contacted  
21 by Tomy.

22 Q Was that Mr. Mouth, to your knowledge, also  
23 called "PAC-MAN" or "CLAMSHELL" design?

24 A I only heard of it as "MR. MOUTH."

25 Q But did you subsequently discover that it was

2           A     As I recall, there was a claim by Tomy, and I  
3 testified earlier today, of their asserting rights in the  
4 Japanese lettering -- I forget what it is called -- lettering  
5 that would say either PAC-O-MAN OR PAC-MAN, but I never  
6 knew it was Mr. Mouth.

7           THE COURT: You mean you did not know it as  
8 "Mr. Mouth"?

9           THE WITNESS: I did not know it to be associated  
10 with Mr. Mouth, excuse me.

11          THE COURT: I see.

12          Q     I show you this Defendant's Exhibit 326, and I  
13 ask you if you can identify that?

14               (Shown to witness.)

15          A     The box says Tomy Pac-Man bank. Here is a bank  
16 that loves to gobble your money.

17               They have Pac-Man <sup>tm</sup> and the box is manufactured  
18 under license from Bally Midway Manufacturing Company,  
19 copyright Bally Manufacturing Company, 1980, Pac-Man and the  
20 Pac-Man characters are trademarks of Bally Manufacturing  
21 Company.

22          Q     I show you Defendant's Exhibit 325, is that also  
23 a wide mouth toy made by the Tomy Corporation?

24               (Shown to witness.)

25          A     It is a toy, trademark Pac-Man, and it says,

2 He has the biggest mouth around, copyright Tomy Corporation,"  
3 and there is an address of "Carson, California, licensed by  
4 Midway Manufacturing, Copyright Midway Manufacturing Company  
5 1980, trademark Midway Manufacturing Company."

6 This would tell me it appears to be a licensed  
7 product from us -- product manufactured under license, excuse  
8 me.

9 Q Referring back to Exhibit 324, I ask you to read  
10 what it says on the copyright on the bottom of that box--

11 THE COURT: Do you have any objection to this?

12 MR. SUSSMAN: No, your Honor.

13 THE COURT: It is received, 324.

14 THE WITNESS: "Mr. Mouth, tm, copyright, 1976,  
15 Tomy Corporation, the address Long Beach, California,  
16 made and packaged in Hong Kong, patent pending."

17 Q Did you know there was a patent application on  
18 this going back to 1976?

19 A Not until Tomy made us aware of it, sir.

20 Q When you found out there was a patent application,  
21 did you see any of the due diligence letters that are connected  
22 with the patent application --

23 THE COURT: Do you understand what that means?

24 THE WITNESS: No sir, I was going to ask.

25 Q I will withdraw the question. Did you see any

2 the patent?

3 A No, sir.

4 Q Did you ask to see any?

5 A I don't recall asking to see any.

6 Q Do you recall a question at that time that others  
7 claimed that they had the right to the PAC-MAN name and  
8 PAC-MAN character?

9 THE COURT: That is too general a question, please.

10 Did you participate in any discussion about --

11 Q -- about demanding of the right to the PAC-MAN  
12 character and PAC-MAN name by the Tomy Company?

13 THE COURT: Did you participate in any of those  
14 conversations?

15 THE WITNESS: Sir?

16 THE COURT: Where Tomy came and claimed that they  
17 had a right to PAC-MAN? Did you participate in any  
18 discussions with Tomy?

19 THE WITNESS: When we heard of their claims,  
20 we turned it -- that information over to counsel.  
21 There were subsequent meetings at our offices with one  
22 of the principals of the -- one of the executives  
23 of Tomy, along with their attorney, and --

24 THE COURT: Were you present?

25 THE WITNESS: I sat in on the meeting, yes. In



2 and one of our outside counsel was there also.

3 Q Who has the right to the Mr. Mouth game?

4 THE COURT: Do you know?

5 A I believe that is a legal question that I  
6 cannot answer.

7 Q Is Mr. Mouth in the PAC-MAN image?

8 MR. SUSSMAN: Can he see it?

9 MR. LICHTENBERG: Wait --

10 THE COURT: Do you want to show it to him and let  
11 him see it?

12 MR. SUSSMAN: May we take it out of the box, your  
13 Honor?

14 THE COURT: Yes.

15 THE WITNESS: May I have the question again?

16 MR. LICHTENBERG: Read it back.

17 THE COURT: No, ask it again.

18 Q Is Mr. Mouth in the PAC-MAN image?

19 A In my opinion it looks very much like a PAC-MAN.

20 Q Is this PAC-MAN bank in the PAC-MAN image  
21 (indicating)?

22 A From looking at the box, having a clam shell effect,  
23 hinged at the back, it looks like a PAC- MAN image in my  
24 mind.

25 Q That was Exhibit 326.

2 MR.SUSSMAN: Received.

3 Q Is Defendant's Exhibit 325, the Tomy windup toy  
4 in the PAC-MAN image?

5 A It certainly appears to be, two clamshells, hinged  
6 at the back.

7 MR. LICHTENBERG: Thank you.

8 Q Talking about PAC-MAN images, you said that there  
9 were PAC-MAN images on your MS. PAC-MAN machine. In the  
10 game itself, on the board, would you please describe what the  
11 MS. PAC-MAN image is?

12 A I do not understand the question.

13 Q Well, is there a MS. PAC-MAN that appears on the  
14 board itself as it is played?

15 THE COURT: What do you mean, the "board?" The  
16 "screen"?

17 Q On the screen?

18 A On the screen.

19 THE COURT: It is on the screen. Go ahead.

20 THE WITNESS: It appears on the screen, yes.

21 Q Would you please describe in your own words what  
22 that MS. PAC-MAN image is?

23 A Okay, MS. PAC-MAN is on the screen, appears as a  
24 yellow dot or ball, with a wedge shaped mouth, ruby red lips,  
25 a beauty mark, fluttering eyelashes, and a ribbon in her hair.

(continued on next page)

EASTERN DISTRICT COURT REPORTERS

UNITED STATES DISTRICT COURT

225 CADMAN PLAZA EAST

BROOKLYN, NEW YORK 11201

4571  
2 BY MR. LICHTENBERG: (Continues of Mr. Jarocki.)

3 Q On the side view are there one or two eyes  
4 on that character?

5 THE COURT: Are you talking now --

6 MR. LICHTENBERG: On the screen, the image  
7 on the screen.

8 Q But on the image that appears on the screen,  
9 do one or two eyes or no eyes appear?

10 A There's one eyelid with fluttering eyelashes,  
11 one.

12 Q Are you not sure -- aren't there two eyes?

13 THE COURT: Are there two eyes or one?

14 THE WITNESS: I said one.

15 THE COURT: He said one.

16 Q On the PAC-MAN are there any eyes?

17 A On the PAC-MAN on the screen, God --

18 THE COURT: Do you want to go to refresh your  
19 recollection?

20 THE WITNESS: I can, sir, but I don't believe  
21 there are any eyes on the original PAC-MAN game.

22 Q Referring to the Ms. PAC-MAN cabinet that's  
23 here in the courtroom --

24 THE COURT: What exhibit is that?

25 MR. RUDOF SKY: 61, your Honor, plaintiff's.

CONFIDENTIAL

EASTERN DISTRICT OF NEW YORK

-----X

BALLY MIDWAY MFG. CO., an  
Illinois Corporation,

Plaintiff,

-against-

MISCHOK TOY CO., INC. d/b/a  
FABLE TOY COMPANY, a New York  
Corporation; FAY SCHWARTZ;  
ABE PLACHTER; ABE STAUM;  
ELDORADO PROPERTIES; PETER  
BUXBAUM; and SURF BOWLER,

Defendants.

82-C-2353

-----X

United States Courthouse  
Brooklyn, New York

December 23, 1982  
9:30 o'clock A.M.

B E F O R E :

HONORABLE EUGENE H. NICKERSON, U.S.D.J.

HARRY RAPAPORT  
MICHAEL PICOZZI  
HENRY SHAPIRO  
OFFICIAL COURT REPORTERS

EASTERN DISTRICT COURT REPORTERS

UNITED STATES DISTRICT COURT  
225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201

MR. LICHTENBERG: On Page 60, line 3:

"Question: All right, Mr. Iwatani, where do you get your ideas for your games you develop for Namco?

"Answer: While I was in the company or while I was in my home.

"Question: Mr. Iwatani, do you ever go to trade shows where games are displayed?

"Answer: When are you talking about?

"Question: In particular, do you go to any trade shows where children's toys are displayed?

"Answer: Yes, I had the experience of attending that.

"Question: Have you ever seen the Tomy toy called Pac-Man?

"Answer: What kind of toy?

"Question: I am referring particularly, Mr. Iwatani, to Exhibit 23 of the Miyake deposition, Page 1, and the toy shown there?

"Answer: Yes, I have seen that.

"Question: Did you see the Tomy Pac-Man toy as illustrated on Page 1 of the Miyake deposition, Exhibit No. 23, before you developed the game idea for Namco's Pac-Man?

"Answer: No, I think it was after.



1 "Question: Then my question, Mr. Iwatani, did  
2 you in any manner based your Pac-Man character for  
3 the Namco arcade game on the Tomy Pac-Man toy?

4 "Answer: No.

5 "Question: Mr. Iwatani, have you ever heard  
6 of the Japanese character Kyutaro?

7 "Answer: You mean the ghost Kyutaro?

8 "Question: Yes.

9 "Answer: Yes, I have.

10 "Question: Have you ever seen the ghost Kyutaro  
11 on the television?

12 "Answer: Yes, I have.

13 "Question: Have you seen any cartoons or character  
14 strips showing the ghost Kyutaro?

15 "Answer: Yes, I have.

16 "Question: Did you see the ghost Kyutaro  
17 on television or in character strips or any cartoon  
18 before you developed the cartoon idea for Namco's  
19 game Pac-Man?

20 "Answer: Yes, I did.

21 "Question: Mr. Iwatani, did you in any manner  
22 based your monster in the Namco Pac-Man game on  
23 Japanese ghost character Kyutaro?

24 "Answer: No, I did not.

25 "Let us take a short break."

EASTERN DISTRICT OF NEW YORK

-----X

BALLY MIDWAY MFG. CO., an  
Illinois Corporation,

Plaintiff,

-against-

MISCHOK TOY CO., INC. d/b/a  
FABLE TOY COMPANY, a New York  
Corporation; FAY SCHWARTZ;  
ABE PLACHTER; ABE STAUM;  
ELDORADO PROPERTIES; PETER  
BUXBAUM; and SURF BOWLER,

Defendants.

-----X

United States Courthouse  
Brooklyn, New York

December 30, 1982  
9:30 O'clock A.M.

B E F O R E :

HONORABLE EUGENE H. NICKERSON, U.S.D.J.

HARRY RAPAPORT  
MICHAEL PICOZZI  
HENRY SHAPIRO  
OFFICIAL COURT REPORTERS

EASTERN DISTRICT COURT REPORTERS  
UNITED STATES DISTRICT COURT

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THE COURT: Members of the jury, I am now going to give you my charge. I am going to give you copies so that you can follow along with me.

JUROR NO. FOUR: Can I get my glasses?

THE COURT: Yes, indeed.

(Pause in the proceedings)

THE COURT: I give you the written charge, because some of these issues are more complex than they might be in an ordinary case. I think it might be useful to you, so you can take this back with you when you go to deliberate.

(Continued on next page)

1 First, as to the validity of the copyrights. I  
2 have determined as a matter of law and I instruct  
3 you that plaintiff has valid copyrights in (1) the  
4 Pac-Man game audio visual work, (2) that Ms. Pac-Man  
5 game audio visual work, and (3) the Pac-Man Pal  
6 pajama bag, and that plaintiff has the right to sue  
7 to protect those copyrights. That issue is not nor  
8 for your consideration.

9 As to the first two works I mentioned, namely,  
10 the Pac-Man audio visual work and the Ms. Pac-Man  
11 audio visual work, you will note that the copyrights  
12 are on the entire moving visual works. Now that does not  
13 mean that every isolated element of the audio visual  
14 works is necessarily protected by those copyrights.  
15 For example, a simple static circle with a pie shape  
16 slice taken out of it is not protected. Nor can the  
17 simple yellow or orange alone be copyrighted. That  
18 is a pre-existing work in the public domain. However,  
19 the copyrights do protect what is of non-trivial  
20 originality in those audio visual works even if that  
21 original part of the work is copied in some static  
22 form such as a stuffed pillow. Plaintiff claims  
23 that the characters of Pac-Man and Ms. Pac-Man, that  
24 is to say, the gobbler figure with all of its  
25 attributes in the audio visual work, is of non-trivial

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MIDWAY MFG. CO.,  
an Illinois corporation,

Plaintiff,

v.

NORTH AMERICAN PHILIPS  
CONSUMER ELECTRONICS CORP.,  
a Tennessee corporation,

and

PARK TELEVISION d/b/a  
PARK MAGNAVOX HOME ENTERTAINMENT  
CENTER, an Illinois partnership,

and

ED AVERETT, an individual,

Defendants.

Civil Action

No. 81 C 6434

Judge George N. Leighton  
Jury Demanded

AFFIDAVIT OF ERIC C. COHEN

1. I am a member of the firm of Welsh & Katz, a member of the Illinois Bar, and am one of the attorneys for plaintiff Midway Mfg. Co. ("Midway") in this action.

2. I have represented Midway in numerous civil actions involving the PAC-MAN copyright over the past four years.


3. I am familiar with the documents produced in Midway Mfg. Co. v. Bandai America, Inc., 546 F. Supp. 125 (D. N.J. 1982) and in Bally Midway Mfg. Co. v. Mischok Toy Co., 82-C-2353 (E.D.N.Y., December 30, 1982).

Exhibit C



4. All of the documents produced to the defendants in Bandai were produced to the defendants in the Mischok Toy case, and all of the documents produced in both of those cases were produced to the defendants in this case.

January 25, 1984

  
Eric C. Cohen

Signed and sworn to before me this 25th day of  
January, 1984.

  
Notary Public

My commission expires: May 24, 1986

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MIDWAY MFG. CO.,  
an Illinois corporation,  
Plaintiffs,  
v.

Civil Action No. 81 C 6434

NORTH AMERICAN PHILIPS  
CONSUMER ELECTRONICS CORP.,  
a Tennessee corporation, and

Judge George N. Leighton  
Jury Demanded

PARK TELEVISION d/b/a  
PARK MAGNAVOX HOME  
ENTERTAINMENT CENTER,  
an Illinois partnership, and  
ED AVERETT,  
an individual,

Defendants.

RESPONSES OF NORTH AMERICAN PHILIPS CONSUMER  
ELECTRONICS CORP. TO PLAINTIFF'S FIRST SET  
OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 33 and  
34, Defendant North American Philips Consumer Electronics  
Corporation, (hereinafter "North American") responds to  
Plaintiff's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

Defendant objects to the definitions and instruc-  
tions which precede the interrogatories and their subparts to  
the extent that such definitions and instructions are contrary  
to the provisions for written interrogatories set forth in the  
Federal Rules of Civil Procedure. Specifically, Defendant  
objects to all definitions and demands which would encompass  
parties or persons other than the parties to this civil

action. Defendant further responds to the interrogatories and their subparts as follows, the interrogatory first being reproduced herein.

Interrogatory No. 1(a)

Does N.A.P contend that the "PAC-MAN audiovisual work" that is the subject matter of Certificate of Copyright Reg. No. PA 83-768 is not a "original work of authorship" under 15 U.S.C. 102?

Response No. 1(a)

Yes.

Interrogatory No. 1(b)

If the answer to subparagraph (a) is in the affirmative, identify with specificity, every legal and factual basis for this contention, including the identity of any document that N.A.P. alleges supports this contention.

Response No. 1(b)

To the extent presently known, North American believes NAMCO had knowledge of the work of Tomy, Corp., Tomy-Kyogo and Kyutaro, a Japanese cartoon figure. Documents relevant to this interrogatory have been produced and used as deposition exhibits in depositions taken in this case.

Interrogatory No. 2(a)

Does N.A.P. contend that the copyright for the "PAC-MAN audiovisual work" Reg. No. PA 73-768 is invalid for any reason?

Response No. 2(a)

Yes.

Interrogatory No. 2(b)

If the answer to subparagraph (a) is in the affirmative, state with specificity the legal and factual basis for this contention, including the identity of any document which N.A.P. alleges supports this contention.

Response No. 2(b)

To the extent presently known, Midway made significant misrepresentations to the copyright office in obtaining the copyright, including the failure to disclose the specific works and the prior ownership interest in the audiovisual work identified in the answer to interrogatory No. 1.

Interrogatory No. 3(a)

Does N.A.P. contend that the K.C. Munchkin audiovisual work is not an infringement of the PAC-MAN copyright?

Response No. 3(a)

Yes.

Interrogatory No. 3(b)

If the answer to subparagraph (a) is in the affirmative, state with specificity the legal and factual basis for this contention, including the identity of every document that N.A.P. alleges supports this contention.

Response No. 3(b)

To the extent presently known, North American's contentions are fully set out in the pleadings, briefs and memoranda of law prepared in conjunction with the hearing on the preliminary injunction and the appeal to the United States Court of Appeals for the Seventh Circuit.

Interrogatory No. 4(a)

Did N.A.P. obtain any opinions from any lawyer, either in the employ of N.A.P. or otherwise, relating to the question of whether K.C. Munchkin, or any version of K.C. Munchkin, was an infringement of Midway's PAC-MAN copyright?

Response No. 4(a)

No opinions of counsel on this question will be relied upon by North American.

Interrogatory No. 4(b)

If the answer to subparagraph (a) is in the affirmative, does N.A.P. intend to offer any testimony or document at the trial relating to or commenting on either the fact that N.A.P. received such an opinion or the substance of such an opinion?

Response No. 4(b)

No.

Interrogatory No. 4(c)

If the answer to subparagraph (b) is in the affirmative, identify all documents relating to such opinions and/or testimony, and state in detail the testimony that N.A.P. intends to offer or may offer at the trial.

Response No. 4(c)

No response required.

Interrogatory No. 5(a)

Has N.A.P. received any communications from consumers relating to either K.C. Munchkin or PAC-MAN?

Response No. 5(a)

To the extent presently known, North American probably received some communications from consumers relating to K.C. Munchkin, at least, either in the form of returns or inquiries as to availability of the game.

Interrogatory No. 5(b)

If the answer to subparagraph (a) is in the affirmative, identify each document that reflects such communications.

Response No. 5(b)

Objection is made to this interrogatory as (i) being overly broad, (ii) requesting the production of documents which are neither relevant to the subject matter of this action nor likely to lead to the discovery of admissible evidence, (iii) being unduly and unnecessarily burdensome.

Interrogatory No. 6(a)

Has N.A.P. received any communications from distributors or retailers relating to any inquiries, comments or complaints by consumers or customers regarding K.C. Munchkin or PAC-MAN.

Response No. 6(a)

Yes, probably.

Interrogatory No. 6(b)

If the answer to subparagraph (a) is in the affirmative, identify each document that reflects any such communications.

Response No. 6(b)

Objection is made to this interrogatory as (i) being overly broad, (ii) requesting the production of documents which are neither relevant to the subject matter of this action nor likely to lead to the discovery of admissible evidence, (iii) being unduly and unnecessarily burdensome.

Interrogatory No. 7

Identify each person within N.A.P. who receives or reviews any inquiries, comments or complaints regarding K.C. Munchkin or PAC-MAN received from distributors, retailers or consumers.

Response No. 7

North American objects to this interrogatory on the grounds that it is overly broad, irrelevant and burdensome.

Interrogatory No. 8(a)

Did N.A.P. conduct any market research with respect to either PAC-MAN or K.C. Munchkin?

Response No. 8(a)

No.

Interrogatory 8(b)

If the answers to subparagraph (a) is in the affirmative, identify each such market research study, and identify all documents and communications relating to such study.

Response No. 8(b)

No response required.

Interrogatory No. 9(a)

Did N.A.P. ever conduct a review of any version of K.C. Munchkin that was created by Ed Averett?

Response No. 9(a)

Yes.

Interrogatory No. 9(b)

If any such review was conducted, identify the person(s) who conducted such review.

Response No. 9(b)

At least, Ralph William Staup and counsel for North American conducted such review.

Interrogatory No. 9(c)

If any such review was conducted, identify any changes that were made in the K.C. Munchkin audiovisual work as a result of or in connection with such review.

Response No. 9(c)

To the extent presently known, any changes that were made in the K.C. Munchkin audiovisual work were identified in the extensive depositions of Ed Averett and Ralph William Staup and during the hearing on the preliminary injunction.

  
One of the Attorneys for  
Defendants

Don H. Reuben  
David W. Maher  
James H. Alesia  
Jaroslawa Zelinsky Johnson  
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Neuman, Williams, Anderson & Olson  
77 West Washington Street  
Chicago, Illinois 60602  
(312) 346-1200



CERTIFICATE OF SERVICE

I, Christine A. Harper, hereby state that I caused a copy of the foregoing Notice of Filing, the Responses Of North American Philips Consumer Electronics Corp. To Plaintiff's First Set of Interrogatories and Responses Of North American Philips Consumer Electronics Corp. To Plaintiff Midway's Request For Production Of Documents And Tangible Things and Certificate of Service to all persons whose name appear on the attached service list by delivering same by special messenger this 19th day of January, 1984.

Christine A. Harper

Subscribed and Sworn  
before me this 19th  
day of January, 1984.

David L. Powers  
Notary Public